BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ROSCOE C. BRYANT Claimant VS. **MID-STATES LEASE & RENTAL CAR** **MID-CONTINENT AUTO SERVICE** Respondents AND **CONTINENTAL WESTERN INS. CO.** Insurance Carrier	)	Docket No. 1,000,409

ORDER

Mid-Continent Auto Service requests review of a preliminary hearing Order entered by Administrative Law Judge John D. Clark on February 1, 2002.

ISSUES

The Administrative Law Judge determined claimant was an employee of Mid-Continent Auto Service (hereinafter Mid-Continent) when he suffered accidental injury in an automobile collision which arose out of and in the course of his employment. The Judge ordered Mid-Continent to provide claimant medical and temporary total disability compensation.

Respondent, Mid-Continent, and its insurance carrier argue that claimant was employed by both respondent Mid-Continent and respondent Mid-States Lease & Rental Car Sales (hereinafter Mid-States). Mid-Continent argues that when claimant was injured he was performing his job duties for Mid-States. Mid-Continent further argues that, in any event, claimant had deviated from the business purpose of his trip when the automobile accident occurred.

Respondent Mid-States argues that it is not subject to the workers compensation act because claimant was its only employee and it did not have a total gross annual payroll of more than $20,000.

Claimant argues that because there was joint employment claimant may proceed against either or both employers and, in any event, the two respondents operated as a joint business venture. Claimant further argues that there was no deviation from the business purpose of the trip and the Administrative Law Judge's decision should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

The respondents, Mid-States and Mid-Continent, are located in the same building and are owned by Shannon Clark and Steve Ayesh, who are husband and wife.

When Mr. Ayesh purchased Mid-Continent in October 2000, the claimant was an employee of Mid-Continent and he continued to perform the same job duties for the new owner, Mr. Ayesh.

Mid-Continent is an automotive repair and body shop. Claimant performed pick up and delivery services for respondent. Claimant would pick up parts, return unused parts, deliver repaired cars to customers, and make bank deposits. Claimant would also answer the phone and sign for deliveries if no one else was available.

In January 2001, Mid-States, a limited liability corporation, was formed primarily to sell automobiles repaired by Mid-Continent. The business is located in the same building with Mid-Continent. The claimant continued to perform his duties for Mid-Continent but also began to pick up and deliver cars for Mid-States. Claimant would also deliver titles to customers of Mid-States and pick up checks for the titles.

Shannon Clark is the owner of Mid-States and also the secretary for Mid-Continent. She testified that on any given work day claimant would be performing services for both businesses. Claimant testified that he was never required to keep paperwork designating for which business he was running the errand.

Although claimant was primarily paid by Mid-Continent he was sometimes paid by Mid-States. Shannon Clark testified she handled payment of the bills for both businesses and it was primarily for her convenience whether claimant was paid by Mid-Continent or Mid-States. However, claimant testified he would only receive checks from Mid-States when Mid-Continent had run out of checks and such payments had nothing to do with the time spent working for Mid-States versus the time spent working for Mid-Continent.

Claimant receives Social Security disability and had arranged for his weekly pay of $200 to be made to his wife because of his fear such payment to him would reduce his disability benefit. When Mr. Ayesh purchased Mid-Continent such pay arrangement

continued. As previously noted, when claimant began performing pick up and delivery services for Mid-States, his pay remained the same and was primarily from Mid-Continent.

Shannon Clark testified that she would instruct claimant at the beginning of the workday what he needed to do or she would leave a stack of car titles with notes attached indicating where each title should be delivered.

On October 15, 2001, claimant left respondents' business location to make some deliveries and was involved in an automobile accident at the intersection of Broadway and MacArthur. Claimant suffered a cervical cord injury and was initially paralyzed from the neck down. Claimant has regained some movement in his arms and legs.

Claimant testified that on the day of the accident he had dropped off some titles at Affordable Auto and because the checks were not ready had proceeded to A.J. Salvage to deliver a title. Claimant also noted that he was to go to Wichita Auto Auction but did not make it there because of the automobile accident.

Both respondents argue that the direction claimant was heading at the time of the accident indicates he was deviating from the most direct route to any business where he might have been going to deliver a title. In addition, both respondents further argue that they no longer conduct business with A.J. Salvage and if that is where claimant was headed it must have been for personal business.

Respondents proffered a map of Wichita at the preliminary hearing which highlighted the locations of the various destinations where claimant was possibly going on the accident date.[1] Claimant testified he was just taking the titles to the appropriate business destinations and had not made any personal stops the morning of the accident. Neither Shannon Clark nor claimant could recall exactly all the destinations claimant had on the morning of the accident.

Kansas has long recognized the principle that where the business errand is finished or abandoned and the worker sets about the pursuit of his own pleasure or indulgence, the employer is not liable for compensation.[2] In 1 *Larson's Workers' Compensation Law*, § 17.01 (2002), it is noted the majority rule is that an identifiable deviation from a business trip for personal reasons takes the employee out of the course of employment until the employee returns to the route of the business trip, unless the deviation is so small as to be disregarded as insubstantial.

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[1] P.H. Trans. at Resp. Ex. 3.

[2] *Woodring v. United Sash & Door Co.*, 152 Kan. 413, 103 P.2d 837 (1940).

The claimant's automobile accident occurred at an intersection not far from where claimant testified he had left a title. A review of the map proffered at the preliminary hearing indicates claimant was neither far removed in time nor distance from other possible locations where he would have visited in the course of his employment. As previously noted, the claimant denied making any personal stops. The Board concludes the evidence does not establish claimant had deviated from the business purpose of his trip. Moreover, in terms of distance and time, any alleged deviation would be so small as to be disregarded based upon the evidence presented at this juncture of the proceedings.

Mid-Continent argues that because claimant was delivering titles for Mid-States that it should not be liable. Claimant was employed by Mid-Continent and his job duties remained the same after Mid-States was created. He was employed by Mid-Continent to perform pick up and delivery services. It is uncontradicted that his job duties never changed after Mid-States began business. Instead he would occasionally perform pick up and delivery services for Mid-States. Claimant continued to be paid the same salary and he continued to be paid by Mid-Continent, except when it was admittedly for the convenience of Shannon Clark to pay claimant from Mid-States. In any event such payments were not linked to any percentage of time spent making pick up or deliveries for one business or the other.

In the determination of the actual relation of several employers to each other and to the employee in any undertaking, courts will look to all circumstances involved in each particular case.[3] *Hobelman v. Krebs Construction Co.*, 188 Kan. 825, 366 P.2d 270 (1961) involved a dispute over the relationship of two alleged employers and whether they were a general contractor and subcontractor or a general employer and special employer. It was noted that if the borrowing employer has the right to exercise control over the loaned employee, the loaning employer is described as the general employer and the borrowing employer as the special employer.

Although the Workers Compensation Act does not make the general-special employer distinction, the Kansas Supreme Court has previously decided that, where a loaned employee is injured and both employers retained the right of control, they are jointly and severally liable and the employee may look to either or both employers for compensation.[4]

The undisputed facts disclose that Mid-Continent loaned its regular employee, the claimant, to Mid-States and that at the time of the injury claimant was doing work for Mid-States which was part of its trade and business, and under the supervision, direction and control of Shannon Clark. Under these circumstances, the Board concludes that the

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[3] *Bright v. Bragg*, 175 Kan. 404, 264 P.2d 494 (1953).

[4] *Mendel v. Fort Scott Hydraulic Cement Co.*, 147 Kan 719, 78 P.2d 868 (1938).

relationship of the respondents to the claimant is that of general employer and special employer, and claimant may look to either or both employers for compensation. Accordingly, the Board affirms the Administrative Law Judge's decision finding claimant was an employee of Mid-Continent and assessing liability against Mid-Continent and its insurance carrier.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge John D. Clark dated February 1, 2002, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2002.

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BOARD MEMBER

c: Kelly W. Johnston, Attorney for Claimant
Paul V. Dugan Jr., Attorney for Mid-States Lease & Rental Car Sales
Ronald J. Laskowski, Attorney for Mid-Continent Auto Service
John D. Clark, Administrative Law Judge
Director, Division of Workers Compensation